



May 25, 2004

Via Electronic Submission

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Nationwide Programmatic Agreement Regarding the Section 106 National Historic
Preservation Act Review Process
WT Docket No. 03-128

Dear Ms. Dortch:

On behalf of the National Trust for Historic Preservation, we are writing to convey our serious concerns about certain provisions in the proposed Nationwide Programmatic Agreement (PA) being developed by the Commission to establish procedures for reviewing the agency's actions under Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f.

The National Trust filed comments on the proposed PA on August 8, 2003. As you know, we have not been allowed to review any revised draft of the agreement, and we are only vaguely aware of which provisions the Commissioners are considering revising, based on our review of ex parte filings with the Commission and discussions with other interested parties. Nonetheless, we would appreciate the Commission's consideration of the following comments.

1. The National Conference of State Historic Preservation Officers (NCSHPO) Has Not Yet Approved the Revised Draft of the PA.

At the NCSHPO annual meeting in Washington on March 10, 2004, the NCSHPO membership unanimously voted that, after the FCC has approved the PA but prior to NCSHPO signing it, the NCSHPO staff and leadership will distribute the revised PA to the entire membership for review, and the members will convene a conference call to discuss whether the SHPOs are "satisfied" with the PA.¹ Because of this requirement for review by the full

¹ See <http://www.ncshpo.org/PDFs/031004annualmtgfinal.pdf> (Minutes at pp.4-5).

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membership, NCSHPO cannot be assumed to have already concurred in the draft PA or any revisions thereto. We urge the Commissioners to contact NCSHPO directly to seek clarification of NCSHPO's internal procedure for soliciting its members' views on the revised PA.

2. The Exclusions Need to be Drafted More Narrowly to Ensure that Towers With Adverse Effects on Historic Properties Will Not Evade Section 106 Review.

Our primary concern is that certain of the exclusions could serve as major loopholes that would allow towers with serious adverse effects on historic properties to evade review, because of the overly broad scope of the exclusions. The purpose of the exclusions is supposed to be to identify circumstances in which there is little or no likelihood of affecting historic properties, and thus, objective criteria can be used to eliminate the need for individual review altogether. As drafted, however, certain of the exclusions will not be limited to cases where there is little or no likelihood of affecting historic properties. The Commission should ensure that the exclusions are narrowly tailored to avoid the unintended consequence of unduly weakening protection for historic properties. Even minor revisions such as those discussed below will help to reduce the numbers of historic properties that are inappropriately exempted from protection as a result of the exclusions.

Exclusion for Industrial and Commercial Property. The exclusion for industrial areas and commercial developments such as strip malls could serve as a major loophole that could allow towers with serious impacts on historic properties to go unreviewed. The apparent rationale for this exclusion is that a telecommunications tower would not substantially exacerbate any potential adverse effect on nearby historic properties when added to an area that is already compromised by industrial or commercial development. Unfortunately, the scope of this exclusion is so broad that it goes far beyond anything that could be justified by such a rationale. We continue to have the following concerns:

- **The industrial/commercial exclusion is a Trojan Horse.** This exclusion would allow a cluster of small businesses or a single business establishment of 10,000 square feet to completely eliminate Section 106 review, even where known historic properties or districts are in close proximity, with no recourse to protect against telecommunications facilities being constructed in the exempt area. Even if the businesses themselves were unobtrusive, with no adverse effect on the nearby historic properties, the commercial or industrial area could serve as a Trojan horse to bring in towers that would most certainly have such an adverse effect, yet would be completely exempt from review.
- **The 10,000-square-foot threshold in the draft PA is far too small,** and would allow even very modest commercial establishments or clusters of small businesses to serve as a magnet for cell towers that would be exempt from review. We continue to believe that 100,000 square feet should be the minimum size for commercial or industrial facilities to trigger this exclusion.

- **The exclusion would drastically reduce the Area of Potential Effects for nearby historic properties.** As drafted for public comment, this exclusion would not apply if structures 45 years or older (i.e., potentially historic) are located within 200 feet of the proposed tower. (Draft PA at III.A.4.) However, the exclusion *would* apply in all other cases, regardless of whether known historic properties are adversely affected. For example, historic structures located 225 feet away from an industrial/commercial property, or historic properties without structures, such as landscapes, battlefields, and traditional cultural properties, even if located less than 200 feet away, would all be excluded from review under this provision. These historic properties would otherwise be entitled to consideration within $\frac{1}{2}$ to $1\frac{1}{2}$ miles of a proposed tower (depending on its height), under the PA provisions relating to the Area of Potential Effects (APE). Within that APE, any proposed tower triggering Section 106 review would require the applicant to seek ways to avoid, minimize, and mitigate adverse effects on the historic property. Under the exclusion, however, the use of a relatively small commercial or industrial property to site the tower would effectively reduce the APE to 200 feet for historic structures, and would eliminate it altogether for landscapes, battlefields, and traditional cultural properties, which are often the most vulnerable to harm from adverse visual effects.
- **The exclusion should be strictly limited to towers that do not exceed 100 feet.** Industrial and commercial buildings are usually quite low in height, and can often be screened from view by landscaping. In historic areas such as residential historic districts or rural historic areas, a mere 10,000-square-foot industrial or commercial development could be completely unobtrusive. A tower that is 200 to 400 feet tall, on the other hand, could adversely affect the setting of historic properties at a great distance. A small industrial or commercial area with very limited adverse effects should not be used to open the door to the far greater adverse effect of a 200-to-400-foot-high tower with visual impacts on a completely different order of magnitude.
- **The exclusion needs to be accompanied by a “safety net.”** Because this exclusion has such a high potential for unintended adverse consequences, as described above, SHPOs and THPOs need to be notified when this exclusion is invoked, and need to be given the opportunity to raise objections based on adverse effects to historic properties.

Exclusion for Replacement Towers. The exclusion for replacement towers should be limited to the replacement of towers that have already complied with Section 106. Without such a limitation, even towers built in flagrant violation of Section 106 could be used to create a permanent zone of immunity from review, regardless of how severe the adverse effects may be.

Exclusion for Right-of-Way Corridors. The philosophy of this exclusion is to encourage construction of towers along existing rights-of-way. However, the exclusion as drafted would also allow towers *outside* the existing right-of-way corridors, which raises a serious risk that historic properties will be adversely affected. Right-of-way corridors are often

carefully realigned to *avoid* historic or archaeological resources, which would remain intact just outside the corridor. Accordingly, the construction of new towers outside the existing right-of-way may in many cases have a *greater* than usual likelihood of affecting historic properties, and could also have the effect of exacerbating existing scars on the landscape. In order to safeguard against these potential adverse effects, the proposed distance of 200 feet from the outer boundary of the right-of-way needs to be substantially reduced, to perhaps 0-25 feet.

3. “Safety Net” Provisions are Needed to Ensure that Visual Effects are Taken Into Account.

- **Ability to Seek Modifications to the APE for Visual Effects.** The rigid formulas for defining the presumed Area of Potential Effects (APE) for visual effects (in section VI.B.2 of the PA, as published for comment), fail to take into consideration local variations in landscape, topography, and viewsheds, or the fact that certain types of historic properties, such as rural properties, landscapes, and battlefields, may have important settings that contribute to their significance. Because of these variables, it is especially important to retain paragraphs VI.B.2.b. and 2.c. of the PA as published, which allow the SHPO/THPO to recommend an alternative APE for visual effects when necessary, and to invoke FCC review if agreement is not reached on the APE.
- **SHPO Authority to Ensure That Specific Historic Properties are Included Within the Scope of the Section 106 Review.** We are aware that the FCC is planning to cut back substantially, if not eliminate, the requirement to survey historic properties subject to visual effects. Instead, we understand that applicants and SHPOs will develop a “list” of historic properties within the APE based exclusively on existing documentation in the SHPOs office. Due to funding inadequacies, however, that documentation may not include all historic properties that the SHPO believes are eligible for the National Register of Historic Places. Therefore, it is important to ensure that SHPOs have the opportunity to request that specific historic properties be included on the “list,” even if the eligibility of those properties for the National Register has not been previously confirmed, as long as the SHPO has a basis for believing that the property is eligible. The Trust addressed this issue in more detail in an e-mail message dated February 11, 2004, which is filed with this proceeding.

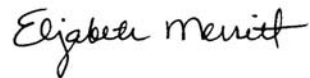
4. The Use of Professionally Qualified Consultants is The Most Effective Way to Streamline Section 106 Review.

The National Trust supports a requirement that Section 106 consultants retained by the FCC’s license applicants should have professional qualifications in historic preservation. We recognize that the industry opposes such a requirement, but in our experience, the Section 106 review process is significantly streamlined for the applicants when qualified professional consultants are used for identifying historic properties and evaluating the effects of new towers on those properties.

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Pease include this letter with the file for this proceeding.

Respectfully submitted,

A handwritten signature in cursive script, reading "Elizabeth Merritt".

Elizabeth S. Merritt
Deputy General Counsel

cc: Chairman Michael Powell
Commissioner Michael Copps
Commissioner Kathleen Abernathy
Commissioner Jonathan Adelstein
Commissioner Kevin Martin
Paul Margie, Esq.
Charlene Vaughn, Advisory Council on Historic Preservation
Nancy Schamu, Executive Director, NCSHPO
Edward Sanderson, Chairman, NCSHPO